SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 24 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 556

BRIDGEPORT FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioners

v.

FEDERAL HOME LOAN BANK BOARD
and
QUAKER CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Bridgeport Federal Savings and Loan Association respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 199 F. Supp. 410 (1961). The Opinion of the Court of Appeals for the Third Circuit is, at the present, unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 1, 1962. The statutory provision conferring jurisdiction to review this case in this Court is 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Must the Federal Home Loan Bank Board hold a hearing which complies with the Administrative Procedure Act and due process in order to authorize the opening of a branch office of a large city Federal Savings and Loan Association in an area served by a small suburban Federal Savings and Loan Association?

2. Does a small suburban Federal Savings and Loan Association have the right to appeal a decision of the Federal Home Loan Bank Board authorizing the opening of a branch office by a large city Federal in the area served by the small Association?

STATUTORY PROVISIONS INVOLVED

Administrative Procedure Act 60 Stat. 237, U. S. C. 1001 et seq., (1946), Sections 5, 6, 7, 8 and 10; Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C. 1464, Section 5(e).

STATEMENT OF THE CASE

The plaintiff-petitioner in this case is the Bridgeport Federal Savings and Loan Association (hereinafter sometimes referred to as Bridgeport Federal), a Federal corporation chartered by the Federal Home Loan Bank Board, pursuant to the provisions of the Home Owners' Loan Act of 1933. The Home Office of Bridgeport Federal is located at 207 W. Fourth St., Bridgeport, Pa.

The defendant-respondent, Quaker City Federal Savings and Loan Association (hereinafter sometimes referred to as Quaker City), is a Federal corporation chartered by the defendant-respondent, Federal Home Loan Bank Board (hereinafter sometimes referred to as Board), pur-

suant to the Home Owners Loan Act of 1933. Quaker City's home office is located at 35 S. 16th St., Philadelphia 2, Pa.

On February 4, 1959, the application of Quaker City was filed with the Board to establish a branch office at King-of-Prussia, Upper Merion Township, Montgomery County, Pa. On April 26, 1960, the Board fixed a hearing in Washington, D. C. for June 20, 1960. On June 8, 1960, notice of intention to appear and objections to the said application were filed separately by respective counsel for Bridgeport Federal, Conshohocken Federal Savings and Loan Association, and Norristown Federal Savings and Loan Association.

On June 20, 21 and 22, 1960, hearings were held before Joseph A. Muldoon, Hearing Officer, at which time testimony was taken on behalf of the applicant, and the three protestants. Thereafter, Briefs and Reply Briefs were filed by counsel for the respective parties.

On March 7, 1961, the decision of the Board was handed down approving the said application. This decision failed to make any Findings of Fact and merely contained Conclusions of Law in the extact words of Section 5 of the Home Owners Loan Act of 1933, 12 U. S. C., 1464.

On June 8, 1960, 12 days before the hearing, counsel for Bridgeport Federal in writing requested the Board to send him two subpoenaes duces tecum to subpoena certain records of Quaker City and of the Township of Upper Merion. On June 15, 1960, the Assistant Secretary of the Board replied by letter that "having no power of subpoena, it does not issue a subpoena duces tecum." At the hearing before the Board, counsel for Bridgeport Federal made a motion that his request for a subpoena duces tecum and the refusal by the Assistant Secretary of the Board be referred to the Board and that Bridgeport Federal be given the opportunity at a future hearing to subpoena certain records of Quaker City which were essential to the issue before the Board. Both motions were overruled by the Board in its decision of March 7, 1961.

On June 8, 1960, counsel for Bridgeport Federal also requested the Board in writing to produce at the hearing on June 20, 1960, its correspondence and Minutes in connection with the branch application and also the reports of any committee or persons appointed by the Board to investigate statements set forth in the application. On June 15, 1960, the Assistant Secretary of the Board replied in writing that the requested records were internal office communications and were not subject to public inspection. At the hearing on June 20, 1960, counsel for Bridgeport Federal made a motion that his request for said records be referred to the Board for further consideration, which motion was dismissed by the Board in its decision of March 7, 1961.

At the hearing on June 20, 1960, counsel for Bridgeport Federal was also prevented from cross-examining Quaker City's witnesses on many important points.

On March 22, 1961, Bridgeport Federal filed the Complaint in the present case with the United States District Court for the Eastern District of Pennsylvania requesting a declaratory judgment and injunctive relief. The jurisdiction of the District Court was founded on the existence of important Federal questions concerning the Home Owners Loan Act of 1933 and the Administrative Procedure Act, and an amount in controversy exceeding, exclusive of interest and costs, the sum of $10,000.00.

On April 14, 1961, a Motion to Dismiss the Complaint was filed by counsel for Quaker City on the grounds that (1) the Court lacks jurisdiction over the subject matter (2) the plaintiff has no standing to complain and (3) the Complaint fails to state a claim upon which relief can be given.

On May 16, 1961, a Motion to Dismiss was also filed by counsel for the Board on the ground that the Court lacked jurisdiction over the subject matter and that the Complaint failed to state a claim upon which relief can be granted.

On November 14, 1961, Judge Kraft of the United States District Court for the Eastern District of Pennsylvania handed down a decision dismissing the Complaint. This decision was appealed to the United States Court of Appeals for the Third Circuit which affirmed the Lower Court's decision in an opinion by Judge McLaughlin on August 1, 1962.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE COURT OF APPEALS CONFLICTED WITH THE APPLICABLE DECISIONS OF THIS COURT IN THAT THE COURT OF APPEALS HELD THAT BRIDGEPORT FEDERAL WAS NOT ENTITLED TO A HEARING IN ACCORDANCE WITH THE DICTATES OF THE ADMINISTRATIVE PROCEDURE ACT AND DUE PROCESS.

1. *Congress Has Conferred a Property Right upon Bridgeport Federal to be Protected Against Destructive Competition.*

Section 5(e) of the Home Owners Loan Act, 48 Stat. 128, 12 USCA Sec. 1461 (1933) (hereinafter referred to as HOLA) sets up a clear statutory definition of the nature of Federal Savings and Loan Associations and of their rights and duties:

> "No charter shall be granted except to persons of good character and responsibility nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, *nor unless the same can be established without undue injury to properly conducted existing local Thrift and Home Financing institutions.*" (emphasis supplied)

What this section does is to confer upon existing institutions such as Bridgeport Federal statutory protection from

economic injury caused by the competition of other Federal Savings and Loan Associations. In *First National Bank of McKeesport v. First Federal Savings and Loan Association*, 225 F. 2d 33 (D.C. 1955), the Court held that the above section of HOLA protected existing federals from applicants for new charters but not from applicants for new branches and made a distinction between branch applications and charter applications. This distinction is unrealistic. Bridgeport Federal will suffer greater "injury" from the destructive competition of the branch of a large city federal than from a newly chartered federal. True, the statute applies to charters and does not mention "branches". But nowhere does the statute recognize that branches can exist at all. The branch system is clearly a creature of a Board itself. Since the Board is limited by statute in the scope of its power to grant charters, it should not be able to circumvent these limitations by its own regulations and thereby permit existing institutions to open far flung branch offices. Any other interpretations of the statute would render Section 5(e) meaningless. It seems unlikely that Congress would enact a provision it intended to have absolutely no effect.

Since HOLA sets up a statutory standard protecting existing Associations, the Court must have the power to enforce this standard when the Board ignores it. Such judicial review is required by the common law, due process and the Administrative Procedure Act, 60 Stat. 237, 5 USCA Sec. 1001 et seq. (1946), (hereinafter referred to as APA).

2. *Bridgeport Federal Was Entitled to an APA Type Hearing.*

The Petitioners claim for relief is based primarily upon the premise that a proper hearing and an administrative determination upon the record as required by APA and the Constitution were denied it by the Board. APA

provisions regulating hearings only come into play, as noted by the Court of Appeals, in case of "adjudication required by statute to be determined on the record after opportunity for agency hearing" (APA section 5). Both the District Court and Court of Appeals in this case took the view that, since HOLA does not expressly require a hearing for the granting of permission to open a branch, Bridgeport Federal has no right to a hearing of the procedural safe guards incident thereto. It is respectfully submitted that this position is incorrect.

In *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), an alien ordered deported sought habeas corpus on the ground that he was denied a proper hearing under APA. The statute authorizing the deportation order was silent as to the necessity for a hearing, as is the statute in the present case. Nevertheless, the Supreme Court ruled that, in spite of an absence of language in the statute requiring an agency hearing, a hearing was required and that APA, therefore, was applicable. It was noted by this Court that the act providing for deportation might be unconstitutional without the requirement of a proper hearing and that this was a compelling reason for reading such a requirement into the Act.

Thus, the *Wong* case established first, that the Court would read a requirement of a hearing into a statute which would be invalid without such a requirement, and second, that proceedings under such a statute would thus come under the provisions of APA.

A case applying the *Wong* rule which comes close to the case at bar in its facts is *Riss & Company v. United States*, 341 U. S. 907 (1951), in which the I.C.C. denied a certificate of convenience and necessity to an applicant without complying with APA. The District Court held that since the relevant statute did not require a hearing, APA was inapplicable. This Court reversed the lower court in a per curiam opinion which merely cited the *Wong* case. In *Riss*, the only thing being denied the applicant was a statu-

tory right to a permit to operate a trucking route. Certainly the applicant had no constitutional right to be a trucker on the requested route since Congress has complete control over interstate commerce. Nevertheless, so that the applicant could have an opportunity to avail himself of his statutory rights, the court felt that due process required a hearing and that APA was applicable. In the present case, as noted above, Bridgeport Federal was given a statutory right to operate in its area without harmful competition. This right should not be denied Bridgeport Federal without due process anymore than the I.C.C. could deny *Riss'* right without it.

The lower Federal Courts have also held that APA will be applicable when a hearing is necessary even though the relevant statute is silent on the point. See *Adams v. Witmer*, 271 F. 2d 29 (C. A. 9 1959); *United States v. Libby, McNeill & Libby*, 107 F. Supp. 697 (D. Alaska 1952); *Reliance Steel Products Company v. United States*, 150 F. Supp. 118 (W.D. Pa. 1957).

HOLA gave Bridgeport Federal a statutory right to operate in the Bridgeport-Upper Merion area without unduly injurious competition from another Savings & Loan Association. This statutory right cannot be taken away from Bridgeport Federal without a fair hearing. To do so would be violative of the due process clause of the Federal Constitution. The *Riss* case, Supra, illustrates the kind of property rights protected by the due process requirement. Another illustration may be found in *Tucker Truck Lines v. United States*, 100 F. Supp. 432 (E. D. Mo. 1951). Herein a trucker intervened in an I.C.C. proceeding and objected to the isuance of a certificate of convenience and necessity to a potential competitor. The I.C.C. hearing did not comply with APA because no statutory provision expressly required it to do so. The court held that an APA hearing was required because otherwise the intervenor would be deprived of his property rights without due process of law. This Court reversed this decision but only on the ground

that the objection raised by the intervenor was not timely. *U.S. v. Tucker Truck Lines*, 344 U.S. 33 (1952). This Court did, however, consider the *Riss* case applicable and, therefore, approved the rule that one in the objecting trucker's position could not be deprived of his property rights without due process (344 U.S. at p. 36). Like the trucker in the *Tucker* case, Bridgeport Federal has a statutory right to operate without unduly injurious competition. The trucker was granted his right by the Interstate Commerce Act. Bridgeport was given its right by HOLA. While each of these acts deals with a different business both acts grant substantially identical rights to existing operations. The rule of *Wong* and *Riss* does not apply only to the I.C.C. or deportation proceedings but is a broad rule of administrative law and must be applicable to the case at bar.

The Court of Appeals in the present case seemed to feel that a hearing was unnecessary for three reasons: firstly, because HOLA does not explicitly state that a hearing on the record must be held in this sort of case (in fact, HOLA does not say anything about this sort of case at all); secondly, because Bridgeport does not have a constitutional right to be free of competition and the Constitution, therefore, does not require a hearing; and thirdly, because, somehow, persons engaged in the esoteric art of banking do not have the rights of those engaged in other businesses.

It is respectfully submitted that none of these reasons will hold up under scrutiny. First, it has been shown that a hearing is required whether the statute setting up the agencies says so or not when rights are to be protected. See *Wong*, supra. The court below states that Bridgeport Federal has no Constitutional right to protection from competition. But this completely ignores the fact that a statutory standard has been set up which specifically protects properly conducted existing local thrift and home financing institutions from undue competitive injury (HOLA 48 Stat. 128, 12 U. S. C. 1464, 1933). This court has repeatedly recognized that rights created by statute require judicial protection.

Leedom v. Kyne, 358 U. S. 184, 190 (1958); *Stark v. Wickard*, 321 U. S. 288, 309-10 (1944); *Riss & Co. v. U.S.*, supra, 341 U.S. 907 (1951). If Bridgeport's right to be free from injurious competition is not given the protection of a due process hearing, reviewable by the courts, it is no right at all and the language of HOLA setting up the statutory standard will be meaningless.

The final basis for the lower court's decision is that banking is a "pecularly sensitive" field and that the Board requires discretion in order to deal properly with the questions facing it. The decision below relies heavily on the fact that the Federal Reserve Board and the Comptroller of Currency have traditionally allowed charters and branch applications without APA type hearings. What the Court of Appeals failed to realize is that HOLA gives existing institutions protection from undue competition while such protection is not given and such standards are not set under either the National Bank Act (18 Stat. 123, R.S. 5168, R.S. 5155; 12 U.S.C. 38, 26, 36) or the Federal Reserve Act (38 Stat. 260, 259; 12 U.S.C. 241, 321, 322). See *Community National Bank v. Gidny*, 192 F. Supp. 514, 518 (E.D. Mich. 1961). Since Congress granted existing institutions such as Bridgeport Federal a statutory right to be protected from undue competition under HOLA, Congress should not be presumed to have given the Board complete discretion to ignore this statutory right.

3. *The Board's Hearing Was Not Fair, Full, and Proper, or in Accordance with Due Process of APA.*

Having established that the hearing by the examiner should have conformed to the provisions of APA, it follows that the petitioner has stated a claim upon which relief can be granted. In paragraph 7 of the complaint, the petitioner claims that the Board based its decision on reports, surveys, and correspondence outside the record of the hearing and that, further, the Board refused to permit counsel for Bridgeport Federal to examine these documents. The very

constitutional requirement of due process which brings this hearing within the provisions of APA prohibits an adjudication other than on the record. See APA Sec. 5; *Ohio Bell Telephone Co. v. P.U.C.*, 301 U. S. 292 (1937); *Brown Pacific-Maxon Co. v. Toner*, 255 F. 2d 611 (C.A. 7 1958). Furthermore, Sec. 7(d) of APA states:

> "Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8."

Since Bridgeport Federal alleges that the transcript was not the exclusive record upon which the decision was based, a proper claim has been stated.

In paragraph 8 of the complaint, it is alleged that the Board did not set forth any findings of fact supporting its conclusions of law. The Board's decision further failed to give reasons supporting the conclusions of law. This was a clear violation of Sec. 8(b) of APA. This section states:

> "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefore, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order sanction, relief, or denial thereof."

Moreover due process requires that an agency make findings and give reasons to support its conclusions of law. See *Ohio Bell Telephone Company v. P.U.C.*, 301 U.S. 292 (1937); *Capital Transit Co. v. P.U.C.*, 213 F. 2d 176, 187 (D.C. 1953); *Amarillo-Borger Express v. U.S.*, 138 F. Supp. 411 (N.D. Tex., 1956).

In Paragraph 6 of the Complaint, petitioner claims that the Board prevented Bridgeport Federal from producing at the hearing records of Quaker City, as to Quaker City's financial ability to operate this branch. Bridgeport Federal further contended that the hearing was not otherwise full

and fair because the Hearing Officer prevented counsel for Bridgeport Federal from any cross-examination of Quaker City's witnesses as to Quaker City's financial ability to operate this branch. Thus the hearing was neither full nor fair because relevant documents were excluded and cross-examination upon vital issues was denied.

Paragraph 6 of the complaint alleges that the Board denied plaintiff the right to subpoena records of Quaker City. Sec. 7(b) of APA states: "Officers presiding at hearings shall have authority subject to the published rules of the agency and within its powers, to . . . issue subpoenas authorized by law." Sec. 6(c) of APA renders such an administrative subpoena enforceable in court.

HOLA, Sec. 5(d) authorizes the board to issue subpoenas. This Act states:

> "The Board or any member thereof or its designated representative shall have the power to issue subpoenas and subpoenas duces tecum and shall issue such at the request of any interested party."

This language appears in the part of Sec. 5(d) which specifically is focused upon hearings on violations of rules set up by the Board. Nevertheless, this sentence does not limit the authorization to issue subpoenas to these hearings only. Moreover, Sec. 5(d) is not, itself, limited to these hearings, but, in many of its parts, applies to all of Sec. 5, including Sec. 5(e) (the provision limiting competition). Section 5, begins "The Board shall have the power to enforce this *section* and rules and regulations made hereunder." Later when Sec. 5(d) is referred to, itself, it is called a "subsection." Since a hearing is required in the present case, the statute should be construed to make it as fair a hearing as possible. Therefore, Sec. 5(d) of HOLA should be construed to authorize subpoenas duces tecum.

Furthermore, if Bridgeport Federal may not be deprived of its rights without due process, it would seem that both justice and the Federal Constitution would require

that it be permitted to subpoena documents. It is true that the Federal court decisions are not clear on whether denial of the right to subpoena by an administrative agency is an invasion of due process. Several state courts, however, found that subpoenas are required by due process. See *Jewell v. McCann*, 95 Ohio 191, 116 N.E. 42 (1917); *Chicago Land Agencies v. Palmer*, 364 Ill. 13, 2 N.E. 2d 910 (1936). In *Low Wah Suey v. Backus*, 225 U. S. 460 (1921), the Supreme Court did hold that when an alien was denied the power to compel the attendance of witnesses; "no Constitutional right was thereby taken from the petitioner." This holding was not explained and may have evidenced an early view toward aliens denying them rights. However, in *Missouri v. North*, 271 U.S. 40 (1926), when the court again held subpoenas were not necessary to render an administrative decision constitutional, it relied heavily on the fact that the administrative officers did have the power to compel testimony through a deposition procedure. In the present case, there was no alternative method by which the plaintiff could get the relevant documents into evidence. Furthermore, plaintiff can show that it was prejudiced by not having these documents in the record. Therefore, cases such as *Reetz v. Michigan*, 188 U.S. 505 (1903), where the lack of subpoenas prejudiced no one, are distinguishable.

For the reason that the statute can be interpreted to require subpoenas and because the Constitution requires them in a proceeding such as this, paragraph 6 of the Complaint states a claim upon which relief can be granted.

4. *Since the Board Held a Hearing, It Was Bound to Follow the Requirement of Procedural Due Process.*

The lower court held that no hearing was required under HOLA or under the Constitution. For the reasons set forth in the previous section of this brief, it is submitted this is wrong. However, even if such an argument had some validity, it could only be made appropriately if, in fact, no hearing had been held. Since the Board granted a hearing,

it was bound legally to grant a full and fair hearing, to base its decision on the record, and to state reasons in support of its decision. Although HOLA makes records of the Board confidential, once a public hearing is held by the Board on an application to establish a branch, the argument that such records are confidential falls by the wayside. If the Board will not issue a subpoena duces tecum to procure such records and refuses to make such records available at the hearing, the action of the Board is arbitrary and capricious and not in conformance with law.

In *Morgan v. U. S.*, 304 U.S. 1 (1938), Mr. Chief Justice Hughes, speaking for the court, stated at page 14:

> "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing',—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard.' "

See also *Ohio Bell Telephone Company v. P.U.C.*, 301 U.S. 292, 304 (1937).

Due process of law requires the Board to make available for examination by all interested parties any reports, economic surveys, correspondence, or other records if the same influenced the Board's decision. See *Ohio Bell Telephone v. P.U.C.*, supra. The performance of the Board in respect to this phase of the hearing might be described as "Operation Bootstrap". First the Board adopts an illegal regulation which prevents Bridgeport from seeing these

records. Then it refuses to make these necessary records and reports available on the ground that it is prohibited from doing so by this very regulation.

B. UNDER THE APPLICABLE DECISIONS OF THIS COURT, THE BOARD'S DECISION TO GRANT QUAKER CITY'S BRANCH APPLICATION WAS REVIEWABLE.

Although the Court of Appeals did hold that Bridgeport has standing, it is a necessary implication, from that Court's decision that this particular action of the Board is not reviewable. It is Bridgeport Federal's position that, under the cases of this Court, such action is reviewable under the Common Law, due process and APA.

1. *The Common Law and Due Process Require Review of the Board's Position Affecting Bridgeport's Rights.*

Before APA, review was authorized in cases in which administrative decisions deprived parties of rights and privileges they were given under statutory standards. In *Dismuke v. United States*, 297 U.S. 167 (1936), this court held the claim of a retired governmental employee to be reviewable although no provision of the statute explicitly provided for review. The court said at page 172:

> "But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant upon facts found or admitted by the administrative officer, is entitled."

Similarly, in *R.F.C. v. Bankers Trust Company*, 318 U.S. 163 (1943), the commission had power to fix minimum attorney's fees under the controlling statute. The court held a decision under this provision to be reviewable on issues of law, thus demonstrating that decisions involving rights are appealable.

In the leading case of *Stark v. Wickard*, 321 U.S. 288 (1944), the Secretary of Agriculture promulgated an order regulating the marketing of milk in the Boston area. The order provided for fixing minimum prices to be paid to producers, and the prescribed formula authorized a deduction for certain payments to cooperatives. Certain producers sought to have the order reviewed and the Secretary enjoined from having it carried out. The statute had no explicit provision for review of this order, but it did have provisions for the review of other orders. This court held the order to be reviewable, taking special note that since Congress authorized judicial review in other situations in the same field and since nothing in the statute explicitly prohibited judicial review, there was every reason to permit review. The court said at pages 309-310:

> "With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue. . . . When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. . . . But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

The above quoted language from the *Stark* case and the facts of that case come so close to the issue presently before the court as to be substantially in point. In the present case, HOLA gives existing associations such as Bridgeport

Federal the right to be free from destructive competition. Furthermore, the statute creating the rights does not by any means gives an indication that review is to be denied. In fact, like the statute in the *Stark* case, it does provide for review of other decisions of the Board. Subsection 5 (d) of HOLA, specifically provides that "The Board shall be subject to suit by any Federal Savings & Loan Association with respect to any matter under this section . . . in the U. S. District Court." One of the "matters" under this section is the right of an association under section 5(e) not to have another association destructively compete with it. Thus, HOLA can and should be construed expressly to provide for review. However, even if there were no provision which could be construed to provide expressly for review, the cases cited show that aside from the dictates of APA a court should take jurisdiction of a case such as this in which an association claims that it is being deprived of its statutory rights.

There is a plenitude of other cases which support the rule that a statute should be construed to grant review of administrative rulings affecting statutory rights in the absence of an express prohibition of such review. See *Shields v. Utah-Idaho Central Railroad Company*, 305 U.S. 177 (1938); *United States v. I.C.C.*, 337 U.S. 426 (1949); *Board of Governors of Federal Reserve System v. Agnew*, 329 U.S. 441 (1947); *Bauer v. Acheson*, 106 F. Supp. 445 (1952). Thus, the decision of the Board is reviewable under the common law of administrative process.

2. *APA Expanded Jurisdiction to Review Administrative Rulings.*

It is well accepted that APA was intended to expand the scope of judicial review of administrative rulings. Section 10 states:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> * * * * *

> "(c) Reviewable acts. — Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

Even those who wish this language to be interpreted in its narrowest form have claimed only that APA should be a restatement of the common law view (under which Bridgeport Federal would have a right of appeal). See 4 *Davis Administrative Law* 38; Sen. Doc. No. 248, 29th Congress, 2d Sess. 229, 415 (1946). However, the Supreme Court has interpreted APA to have a much broader effect. In *Brownell v. We Shung*, 352 U.S. 180 (1956), the court stated at 185:

> "'Exemptions from the . . . Administrative Procedure Act are not lightly to be presumed' . . . and unless made by clear language or supersedure the expanded mode of review granted by that Act cannot be modified."

In accord with this position are: *Shaughnessy v. Petriero*, 349 U.S. 48, 51 (1955); *Heikkila v. Barber*, 345 U.S. 228, 232 (1953); *Amarillo-Borger Express v. U.S.*, 138 F. Supp. 411 (N.D. Tex., 1956); *Leedom v. Kyne*, 358 U.S. 184 (1958). See Louis L. Jaffe, "*The Right to Judicial Review*," 71 Harv. L. Rev. 401 (1958).

The legislative history of APA demonstrates that one of the primary purposes for its enactment was to insure the right of review in every case in which the controlling statute did not explicitly preclude review.

The following exchange is reported in APA, Legislative History, 1944-46, 79th Cong. at page 311:

> "Mr. Austin: Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide a review?
>
> "Mr. McCarran: That is correct.

"Mr. Austin: And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?

"Mr. McCarran: That is true; the Senator is entirely correct in his statement."

Similar statements are made in the Legislative History at pp. 318, 325-26, and 384.

HOLA provides that "no charter shall be granted *unless in the judgment of the Board* an institution can be established without undue injury to properly conducted existing local thrift and home financing institutions." Language such as that requiring the Board to use its "judgment" should not render an administrative decision discretionary under APA. This is especially so where an administrative tribunal exceeds its power so as to take an action in contravention of a statutory mandate. For example, in *Leedom v. Kyne*, 358 U.S. 184 (1958), a decision of the NLRB held that a mixed group of professional and nonprofessional employees was an appropriate collective bargaining unit. The act provided that a mixed unit should not be appropriate unless the professional employees approved. The NLRB did not permit a vote among the professionals. The court held the decision to be reviewable, stating at page 190:

"Here, differently from the Switchmen's case 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which congress' has given professional employees, for there is no other means, within their control . . . to protect and enforce that right. . . . This court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."

In the present case, as in *Leedom v. Kyne*, the petitioner is appealing from an administrative decision which is not in accord with the statute. Quaker City's proposed branch office will unduly injure Bridgeport and its investors. HOLA says that such an injurious new office is not authorized. Nevertheless, the Board purported to authorize it. Certainly, this is an appealable decision under *Leedom*. The fact that HOLA requires the Board to use "judgment" does not authorize it to make decisions which are not based on evidence and which are not in accordance with the specific standards set up by HOLA.

It should further be noted that words seemingly rendering an administrative decision unappealable have not prevented this Court from permitting review under APA. In *Shaughnessy v. Petriero*, 349 U.S. 48 (1955), this court held that the administrative decision was reviewable even though the statute stated that it should be "final."

Moreover, even if a decision is discretionary not all discretionary acts are unreviewable. Section 10(e) of APA states that the "reviewing court shall . . . set aside agency action . . . found to be . . . an abuse of discretion." This language shows that, in spite of the introductory clause, some discretionary actions must be deemed reviewable. Thus, only some discretionary acts are unreviewable. Those that have been held so do not concern the application of a statutory standard as in the present case. For example the following decisions were unreviewable: *Hourihan v. NLRB*, 201 F. 2d 187 (D.C. 1952), cert. denied 345 U.S. 930 (1953) (The decision of the NLRB not to prosecute); *Lansden v. Hart*, 180 F. 2d 679 (C.A. 7), cert. denied 340 U.S. 824 (1950) (Presidential decision to prohibit hunting of wild geese in area); *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163 (1919) (Government taking possession of phone lines); *Dorsheimer v. U. S.*, 74 U.S. 166 (1868) (remission of penalty by Sec. of Treas.). On the other hand discretionary decisions concerning rights have been reviewed for their

abuse; *Hintopolus v. Shaughnessy*, 353 U.S. 72, 77, 78 (1959); *Jay v. Boyd*, 351 U.S. 345 (1956); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

3. The McKeesport and Rowe Cases Are Not Controlling.

In two cases decided by the D. C. Court of Appeals, it was held that certain decisions of the Federal Home Loan Bank Board were unreviewable. In *First National Bank of McKeesport v. First Federal Savings and Loan Association*, 225 F. 2d 33 (D. C. 1955), it was held that the Board's decision to permit a competing branch to be opened was unreviewable. In *Federal Home Loan Bank Board v. Rowe*, 284 F. 2d 274 (D. C. 1960), it was held that an order denying an application for charter was unreviewable.

These cases are distinguishable from the present matter. In the *Rowe* case, the court admitted that "of course, the mere absence from a statute of provision for judicial review 'has sometime been held not to foreclose review,' *as where some 'rights' may arise under an applicable statute or from unlawful agency action.*" This statement shows the point at which the *Rowe* case is distinguishable from the case at bar. Rowe was merely an individual applying for a new charter from the Board and hence had no statutory property right which required protection from destructive competition. Bridgeport Federal, on the other hand, has been operating under a federal charter since 1952 and has a right arising under HOLA. This right is to operate in an area without having another Federal open a destructively competitive branch.

In the *McKeesport* case, the plaintiffs were a National Bank, a mutual savings institution and a State Building and Loan Association. Therefore, this case can be distinguished on the ground that HOLA conferred the statutory right only upon Federal Savings and Loan Associations and not upon these other institutions. It is no argument against this distinction that the court in the *McKeesport* case said, by way of dicta, that these other types of organizations are "local thrift and home financing institutions" protected by

HOLA. Within one year after the *McKeesport* case, the same Circuit Court decided in *Union National Bank of Charlesburg v. Federal Home Loan Bank Board*, 233 F. 2d 695 (D. C. 1956) that commercial banks and industrial loan companies organized under the laws of West Virginia were not "local thrift and home financing institutions" contemplated by Sec. 5 (e) of HOLA and consequently any competition which those types of institutions received from Federals was lawful.

The Supreme Court of Texas has recently decided a case in compliance with the reasoning set forth by the petitioner in the present case. In *Brazosport Savings and Loan Association v. American Savings and Loan Association*, 342 S.W. 2d 747 (Tex., 1961), a group of savings associations appealed from a decision that they had no standing to review the granting of a charter to a new association. The Court held that the grant of the charter was reviewable, stating at page 752:

> "In accordance with prior decisions of this and other courts with which we agree, we believe that petitioners possess a valuable and vested property right in their franchises. Petitioners' allegations of fact that this right has been infringed upon by the action of the commissioner must be taken as true in view of the procedural status of the case. Therefore, we hold that petitioners are entitled to an opportunity to prove their allegations that the commissioner's action was illegal or without support in substantial evidence, and to appropriate relief if this be proved. Such an opportunity is afforded to petitioners by the due process clauses of the constitution of this state and of the United States."

4. *Review of this Case Would Not Withdraw the Decision from the Expertise of the Board.*

The Board has strenuously argued that the permission of judicial review in a case such as this would take the decision away from the experts and place the task of supervising the Federal Home Loan Bank system in the courts.

This argument is entirely mistaken. Bridgeport Federal does not contend that the basic decisions requiring expertise be made by the courts. It only contends (1) that it be given an opportunity to assert its case to the decision makers, be they members of the Board or the court, and (2) that the decision made on the branch application must not ignore the statutory right given to Bridgeport which is clearly set out in HOLA.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Petition for Certiorari should be granted.

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APPENDIX A

OPINIONS OF LOWER COURTS

United States District Court for the Eastern District of Pennsylvania.

KRAFT, *J.*

This is an action by Bridgeport Federal Savings and Loan Association ("Bridgeport") for declaratory and injunctive relief against the Federal Home Loan Bank Board ("Board") and Quaker City Federal Savings and Loan Association ("Quaker City"), following the Board's approval of Quaker City's application to establish a branch office. The case is before us on defendant's motions to dismiss.

The averments of the complaint may be briefly summarized. Bridgeport maintains its principal office and place of business at Bridgeport, Pa. Quaker City's principal office and place of business is in Philadelphia. On February 4, 1959, Quaker City filed an application with the Board to establish a branch office at King of Prussia, Montgomery County, Pa. After due notice, hearings on the said application were held before a Hearing Officer, and evidence was submitted by Quaker City and by three protestants, including Bridgeport. Counsel thereafter submitted briefs, and, on March 7, 1961, the Board rendered its decision approving the application.

Bridgeport contends that in the conduct of the hearings the Board failed to comply with the requirements of the Administrative Procedure Act ("APA") in several particulars. It complains, inter alia, of the Board's refusal to issue subpoenas duces tecum at Bridgeport's request; of the Board's refusal to make available at the hearing the correspondence, reports and economic surveys which the Board considered in reaching its decision; of the Board's failure "to make Findings and Conclusions, as well as the

reasons or basis therefor upon all the material issues of fact, law or discretion presented on the record." Bridgeport further contends that the Board erred in its conclusions of law and order, and that the Board's decision is subject to judicial review under Sec. 10 of APA.

Defendant's motions to dismiss assert that the Court lacks jurisdiction over the subject matter; that Bridgeport is without standing to complain of the Board's action; that the complaint fails to state a claim upon which relief can be granted.

We are not persuaded that the APA is applicable here either in respect to the Board's procedure or to the right to judicial review. Sec. 5 of the Act, 5 U.S.C. 1004, requires that "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (except in six listed circumstances not here applicable), an agency shall observe certain procedures specified in subsequent sections of the Act.

Under Sec. 5(a) of the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. 1464(a), "the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation" of Federal savings and loan associations, "and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." While HOLA does not give explicit authority to the Board to permit branch offices for associations set up under its guidance, there is language in the statute which seems to recognize such authority. At any rate, it has several times been held that a Federal savings and loan association can have a branch office. See, e.g., North Arlington Nat. Bank v. Kearny Federal Savings & Loan Ass'n., 187 F. 2d 564 (3rd Cir. 1951). Regulations adopted by the Board provide for the establishment of branch offices. 12 C.F.R. 545.14.

HOLA contains no specific requirement for an agency hearing even in the case of an application for an original

charter. However, it has been assumed that a hearing is required in that instance. First National Bank v. First Federal Sav. & L. Ass'n., 225 F. 2d 32, 36 (D.C. Cir. 1955). The only reference in the Regulations to a hearing on a branch office application is found in 12 C.F.R. 542.2. What is of vital importance here, however, is that neither HOLA, as amended, nor the regulations thereunder, contain any provision that an application for a branch office must be "determined on the record after opportunity for an agency hearing."

Bridgeport points to Sec. 5(e) of HOLA, 12 U.S.C. 1464(e) which provides:

> "No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, *nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.*" (Emphasis added.)

Bridgeport recognizes that this provision applies to charters and makes no reference to branches, but contends that the same considerations are relevant in both cases. In our view of the case, the point is immaterial. Bridgeport places particular emphasis on the underscored portion, and argues that this confers upon existing institutions such as Bridgeport statutory protection from economic injury caused by competition of other Federal savings and loan associations. This protection, the argument runs, is a property right, and it follows that the requirements of due process necessitate an APA hearing before Bridgeport can be deprived of that property right. Reliance is placed on that line of cases begnining with *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950). In *Wong* the Supreme Court gave definitive interpretation to Sec. 5 of APA (p. 50):

> "We think that the limitation to hearings 'required by statute' in §5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency."

While we have been impressed by Bridgeport's able and ingenious argument, we are unable to agree with its conclusion. Bridgeport has no common law right to be free from competition;[1] nor, in our opinion, does the language relied upon confer such a right. We think the considerations mentioned in 1464(e) are mere criteria or standards to guide the Board in its decision on an application for a charter. The criterion, in relevant regard, is that no charter shall be granted unless *in the judgment of the Board* an institution "can be established without undue injury to properly conducted existing local thrift and home-financing institutions." Having in mind the magnitude of the public interest affected, it seems clear that the standards prescribed in 1464(e) far transcend the interests of any particular institution. In speaking of this very provision, in Federal Home Loan Bank Board v. Rowe, 284 F. 2d 274, 275 (D.C. Cir. 1960), the Court well said:

> "No statutory provision whatever was made for hearings through the medium of which the prescribed criteria were to be established. On the contrary, Con-

[1] Tennessee Power Co. v. T.V.A., 306 U. S. 118 (1939).

gress clearly reposed in the Board a wide discretion in its determination of whether or not the standards had been met. The Board was charged with a high responsibility, and was commensurately bound to exercise its best judgment, necessarily flexible in the banking and monetary field, in order 'to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes. . . .' The Board was not required to issue a charter; it might issue within a given area more than one. It might limit the issuance to a single association. Congress knew very well that conditions in an agricultural area might differ from those in an urban field or a mining community. A delicate balance of the Board's judgment clearly was required in determining the likelihood of successful operations, not only for the welfare of shareholders in the association but with regard to the possible impairment of confidence in and the stability of other thrift institutions. The Government itself had a continuing interest in each such association as might qualify for a charter. In particulars here pertinent, from 1933 to the present time, Congress has never amended the basic act."

Since HOLA makes no provision whatever for a hearing, and, since, in our view, the requirements of due process do not necessitate an APA type of hearing, we think Bridgeport has no legal ground to complain of the procedure befor the Board.

The Board, after due consideration, determined that: ". . . a necessity exists for a branch office at, or in the immediate vicinity of 149 South Gulph Road, King of Prussia, Upper Merion Township, Montgomery County, Pennsylvania, there is a reasonable probability of its usefulness and success, and said branch office can be established at such locality without undue injury to properly conducted existing local thrift and home-financing institutions."

HOLA makes no provision for judicial review of an order of the Board approving or denying an application for an original charter. (The Act, as noted heretofore, does not expressly provide for branches). As remarked in the *Rowe* case, supra, "This omission was no inadvertence, indeed Congress fully intended that the Board possess vast discretion before 'the Board approves the application.'" Congress *did* provide for judicial review of proceedings under 12 U.S.C. 1464(d) (1) to enforce compliance with laws and regulations. We do not agree with Bridgeport's contention that the last sentence of this same subsection confers a right to judicial review of the instant proceeding.

Sec. 10 of APA, 5 U.S.C. 1009, provides in relevant part:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.
>
> "(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

We think authority to permit establishment of a branch is clearly committed to agency discretion. It is unnecessary to enlarge upon the place of banking in our increasingly complex and interdependent society. While savings and loan associations do not engage in a general banking business, they do perform a vital function in the local communities. The question of the necessity or justification for an expansion of banking and credit facilities in a community, is one which calls for highly specialized knowledge, and sensitive, almost intuitive, judgment. It is a reasonable assumption that in such matters Congress intended to repose ultimate authority in those duly qualified by education, training and experience. The observations of Mr. Justice Rutledge, concurring, in Board of Governors of

Federal Reserve System v. Agnew, 329 U. S. 441, 450 (1947), is appropriate in present context:

> "Not only because Congress has committed the system's operation to their hands, but also because the system itself is a highly specialized and technical one, requiring expert and coordinated management in all its phases, I think their judgment should be conclusive upon any matter which, like this one, is open to reasonable difference of opinion. Their specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it. Accordingly their judgment in such matters should be overturned only when there is no reasonable basis to sustain it or where they exercise it in a manner which clearly exceeds their statutory authority."

We have read the many cases cited in Bridgeport's able and comprehensive brief. Some of these cases may appear to support Bridgeport's position, but we do not regard them as controlling authority. The rulings in this area of the law are perhaps difficult to harmonize.

First National Bank v. First Federal Sav. & L. Ass'n., 225 F. 2d 33 (D. C. Cir. 1955), relied on by defendants, is directly in point. That case involved actions by several financial institution for declaratory and injunctive relief against the Board and two Federal savings and loan associations, following the Board's approval of applications to establish branch offices. The Court held that the adjudication and procedural provisions of APA were inoperative in the case of an application for a branch office (p. 36):

> "While neither Section 5(e) nor any other section of the act specifically requires an agency hearing

in granting an original charter, we may assume for the purposes of these cases that such a hearing is required in that instance. Even so, the same formalities are not required in the consideration of an application for a branch. Section 5(e) quoted above refers simply to 'charters' and governs the Board's consideration of an application for the grant of a charter to establish an 'institution.' A branch, however, is not an 'institution' and does not require a charter, its establishment being of an entirely different character.

"Section 5 of the Administrative Procedure Act, 5 U.S.C.A., §1004, requires that '(i)n every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing' (except in six listed circumstances not here applicable), an agency shall observe certain procedures specified in subsequent sections of that act. Neither the Home Owners' Loan Act of 1933, as amended, nor the regulations thereunder, contains any provision that an application for a branch must be 'determined on the record after opportunity for an agency hearing.'

"Appellants urge that Section 5(e) of the Home Owners' Loan Act gives them protection from 'undue injury' in the establishment of a branch, and contend that, even though that act does not specifically provide for a determination on the record, they are entitled, as a matter of constitutional due process, to the adjudication and procedural provisions of the Administrative Procedure Act, citing in support Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616; Riss & Co. v. United States, 341 U.S. 907, 71 S. Ct. 620; 95 L. Ed. 1345; Cates v. Haderlein, 342 U.S. 804, 72 S. Ct. 47, 96 L. Ed. 609; United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 73 S. Ct. 67, 97 L. Ed. 54. None of these cases has application here. We think it clear that, even if it be assumed that Section 5(e) requires an agency hearing

on the original grant, there is no such requirement on an application for the establishment of a branch."

The Court further held that the Board's action was not subject to judicial review (p. 36):

> "What we have said disposes of these cases and we, therefore, are not bound to consider the question of appellants' standing. We merely call attention to the fact that, since authority to permit establishment of a branch is clearly committed to agency discretion, the matter is disposed of automatically by Section 10 of the Administrative Procedure Act, 5 U.S.C.A. §1009."

We conclude, therefore, that the complaint fails to state a claim upon which relief can be granted.

ORDER

NOW, November 14th, 1961, it is ordered and decreed that defendants' motions to dismiss be, and they are, granted, and the complaint is dismissed.

/s/ C. WILLIAM KRAFT, JR., *Judge*

United States Court of Appeals for Third Circuit.

(Filed August 1, 1962)

By MCLAUGHLIN, *Circuit Judge.*

The Federal Home Loan Bank Board approved the application of Quaker City Federal Savings and Loan Association for permission to establish a branch office in King

of Prussia, Upper Merion Township, Montgomery County, Pennsylvania.[1] Bridgeport Federal Savings and Loan Association, complaining of the decision, filed a complaint in the district court against the Board and Quaker City, seeking declaratory and injunctive relief. The district judge granted the defense motions to dismiss the complaint on the ground that it failed to state a claim upon which relief can be granted. Bridgeport appeals.

Preliminarily, Bridgeport, under the facts, has standing to complain of the Board's action., North Arlington National Bank v. Kearny Federal Savings and Loan Association, 187 F.2d 564, 565 (3 Cir. 1951). And the Board's authority to permit branch offices for chartered Federal savings and loan associations is soundly established. North Arlington Bank v. Kearny Federal Savings and Loan Association, supra; First National Bank v. First Federal Savings and Loan Association, 225 F.2d 33 (D.C.Cir. 1955). Springfield Institution v. Worcester Federal Savings and Loan Association, 329 Mass. 184, 107 N.E.2d 315 (1952), cert. den. 344 U.S. 844 (1952); 12 C.F.R. 545.14.

It seems to us also that the district judge was right in concluding that in the first instance there would have been no necessity for a Board hearing on the Quaker City appli-

[1] The Board found "that a necessity exists for a branch office . . . in the immediate vicinity . . ., there is a reasonable probability of its usefulness and success, and said branch office can be established at such locality without undue injury to properly conducted existing local thrift and home-financing institutions . . ." This is substantially the same language appearing in Section 5(e) of the HOLA, 12 U.S.C.A. Section 1464(e) setting forth the criteria for the granting of charter applications. The same criteria are apparently used by the Board for the granting of branch office applications. See Breisacher, The Handling of Applications for Federal Savings and Loan Association Charters and Branch Offices by the Federal Home Loan Bank Board, 16 Bus. Law 146, 150 (1960). See also North Arlington Nat. Bank v. Kearny Fed. Sav. & L. Ass'n, 187 F.2nd at 576; Curry, Basic Factors Affecting Federal Home Loan Bank Board Decisions, 15 Bus, Law 238 (1959).

cation for the branch involved.[2] That is the specific holding in the First National Bank opinion, supra, where the court said page 36: "Section 5 of the Administrative Procedure Act, 5 U.S.C.A. §1004, requires that 'in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing' (except in six listed circumstances not here applicable) an agency shall observe certain procedures specified in subsequent sections of that act. Neither the Home Owners' Loan Act of 1933, as amended, nor the regulations thereunder, contains any provision that an application for a branch must be 'determined on the record after opportunity for an agency hearing.'" See also Federal Home Loan Bank Board v. Rowe, 284 F.2d 274 (D.C.App. 1960); 12 C.F.R. 542.2.[3]

This brings us to the main issue in the appeal. After the present Quaker City application was filed with it, the Board fixed a hearing date for the application as June 20, 1960. A hearing was held June 20, 21, 22, 1960. There was testimony for the applicant and for Bridgeport and two other protesting Federal savings and loan associations. Bridgeport complains that the hearing was not full and fair. Prior to the hearing it asked the Board for subpoenas duces tecum to be served on Quaker City and Upper Merion Township. The Board notified Bridgeport it had no subpoena power and could not issue the requested subpoenas. Bridgeport also requested the Board to produce

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[2] Nor is the Federal Reserve Board, see 12 C.F.R. Section 262.4, or the Comptroller of the Currency, see 26 F.R. 11353, eff. Dec. 12, 1961, 12 C.F.R. 4.8a, required to conduct hearings with respect to membership, charter or branch applications. And see 1 Davis, Administrative Law Treatise (1958), Section 4.04.

[3] It is provided in 12 C.F.R. Section 542.2 that "The Board may order a hearing in connection with the consideration of any matter arising under any provision of the rules and regulations in this subchapter, whether or not any request therefor has been made by any person. The Board may deny any request for, or dispense with, any hearing for which this section provides when, in its judgment, no need therefor exists."

at the hearing its correspondence and minutes and reports relating to the application. The Board denied the request because the matters requested were intra office and not subject to public inspection.

We see no argument in appellant's brief regarding the subpoena duces tecum point; in any event we are not referred to or have we found anything to contradict the Board's statement that it does not possess subpoena power in application proceedings. However, refusal of the request to the Board for its data regarding the Quaker City branch application and the circumscription of Bridgeport's cross-examination are more than sufficient to bring up the question of whether the kind of hearing which was held satisfied procedural due process.

The hearing was designedly limited in scope. The Board states it was called "to help the Board get external economic facts and the view of interested parties to aid in its decision . . . ." Admittedly, confidential financial information concerning the applicant was not permitted to be made available to the objectors at the hearing; for example, the hearing examiner ruled:

> "There is a division of supervision which has authority over the associations and goes into their reserve position. Now, the Board requested an opinion from this division as to their reserve position. . . . If a protestant feels there is an association engaging in unsound practices, and not a proper association, the Board will not allow these matters to be gone into at this hearing. A communication can be sent to the Board or to the supervising authorities, if you feel you want to take it up. But I will not allow you to take it up at this hearing."

It is that sort of restriction that is protested, appellant stating that "once those records became material to this application and were, in fact, considered by the Board in arriving at its decision, those records lost their confidential

nature as among the Board, the Applicant and the Protestants." In connection with this appellant contends that the Board must follow the Administrative Procedure Act in allowing association branches but, as we have seen, this particular agency is not one of those tied into the adjudication procedures of that Act. Nor does the original question concerning the competition from the new Quaker City branch to the complaining associations of itself produce a constitutional question and thus create the necessity of a hearing initially. With that background, the Board held a hearing for its specific purpose of obtaining certain particular information it desired in connection with its appraisal of the application before it. This seems generally akin to the problem passed on in Ludecke v. Watkins, 335 U.S. 160 (1948), where the Court held, pp. 171-172:

> "The fact that hearings are utilized by the Executive to secure an informed basis for the exercise of summary power does not argue the right of courts to retry such hearings, nor bespeak denial of due process to withhold such power from the courts."

The non-disclosure of information was in complete accord with the controlling regulation in 12 C.F.R. §505.12 which provides that:

> "The giving out of any such records or information, or documents relative thereto . . . is held to be contrary to public policy by reason of its privileged and confidential character involving delicate and sensitive matters relating to the condition and affairs of financial institutions and not be permitted."

The use and non-disclosure of confidential information is common practice in the banking field and has been so recognized and sanctioned by Congress. In Monograph No. 13, Senate Document No. 186, 76th Cong., 3d Sess., 43 (1940-41), it is noted that:

> "The nature of banking and the public interest in banks shape the procedural aspects of bank supervision in forms different from those encountered in other branches of administrative regulation. By reason of the fact that few banks operating at a profit can, upon demand, pay off its depositors in cash, there has been traditionally a policy of withholding from the public all information which, either with or without justification [i.e. because of public understanding or misunderstanding], might provoke a depositors' run on a bank. . . . As a corollary, the exercise of supervisory powers over banks has traditionally been attended by a secrecy antithetical to the publicity which marks most regulatory agencies."

In refusing to recommend to Congress "that either hearings be held prior to denial [of applications] or that in all cases the identity of the author of the adverse evidence be disclosed to the applicant", the Attorney General's Committee on administrative procedure in federal agencies pointed out that in

> "determining whether individuals are suited to engage in the banking business, or whether the community needs a bank, or whether a bank should be insured and similar questions, a congeries of imponderables is involved, calling for almost intuitive judgment so that hearings are not ordinarily useful, and that the banking business is a delicate one so that the advantages and importance of ready and frank information may outweigh the dangers of accepting confidential information."

Senate Document No. 8, Vol. 2, 77th Cong., 1st Sess., 143 (1941). See Federal Home Loan Bank Board v. Rowe, 284 F.2d at 278. The fact that banking agencies such as the Board have "the power of close supervision of day to day operations . . .", 1 Davis, Administrative Law Treatise (1958), Section 4.04, p. 248, must also be considered. The

functions of the Board, some of which are investigatory in nature, minimize possible dangers from the use of confidential reports.[4]

Appellant in its sincere and well presented argument relies, as it must, primarily on cases led by Interstate Commerce Commission v. Louisville and Nashville R.R., 227 U.S. 88 (1913) and Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292 (1937). These are of no help with respect to the agency before us. In the first of them the statute gave the right to full hearing with the privilege of introducing testimony ". . . and at the same time imposed the duty of deciding in accordance with the facts proved." And the rates prescribed by the Interstate Commerce Commission had to be supportable by

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[4] Cf. Apfel v. Mellon, 33 F.2d 805, 807-808 (D.C.Cir. 1929): "It is reasonable to believe that Congress intended that a careful investigation should be made by the Federal Reserve Board concerning the character and competency of the incorporators of such an enterprise, as one of the means of determining whether to grant or withhold their approval of the application for incorporation.

"The statutes relating to the organization of national banks are analogous to those now in question. It is therefore proper to note that the Comptroller of the Currency has prescribed the following as one of the regulations governing the investigations to be made by the examiners relating to applications for national bank charters: 'In making this investigation the examiner is instructed to give full consideration to all factors entering into the proposition. Among other matters to be considered are: First, the general character and experience of the organizers and of the proposed officers of the new bank; second, the adequacy of existing banking facilities and the need of further banking capital; third, the outlook for the growth and development of the town or city in which the bank is to be located; fourth, the methods and banking practices of the existing bank or banks, the interest rates which they charge to customers, and the character of the service which as quasi-public institutions they are rendering to their community; fifth, the reasonable prospects for success of the new bank if efficiently managed.'"

"substantial evidence". 227 U.S. 91, 94. The Public Utilities Commission litigation is just as foreign to our issue.

The Federal Home Loan Bank Board is an agency which has been granted a broad discretion by the Congress in its disposition of applications of the type involved. The rulings of the Board are the result of its expert judgment, its policy, the reports, recommendations and analyses of its staff, plus any specal evidence it might conclude necessary to obtain by way of hearing. Congress recognized that if this agency was to really operate successfully in the huge area of public service to which it is assigned, it needed wide discretionary powers in its day to day practical decisions and granted the Board that authority. Through the years, the generally admirable results obtained by the Board in its own peculiarly sensitive banking field have confirmed the wisdom of the judgment that "the advantages and importance of ready and frank information" gathered by the Board through reports submitted by financial institutions, audits and investigations will "outweigh the danger of accepting confidential information" and using it in passing upon applications before it. It is not the perfect solution but it is a solution that has gotten this phase of the Board's important public business done in creditable fashion. The decision law supports that method. As we see it the facts of this appeal do not call for any change in that procedure. Even if a change were indicated now or later that would be for the consideration of the Congress.

The judgment of the district court will be affirmed.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

Administrative Procedure Act 60 Stat. 237, 5 USC 1001 et seq. (1946)

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

(b) The agency shall afford all interested parties opportunity for . . . hearing . . . in conformity with sections 7 and 8 of this Act.

Sec. 6.

(c) Subpenas-Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) Presiding Officers.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Hearing Powers.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) Evidence.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as

supported by and in accordance with the reliable probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) Record.—The transcript of testimony and exhibits together with all papers and requests filed in the proceedings, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Sec. 8

(b) Submittals and decisions.—Prior to each recommended initial, or tentative decision, or decision upon agency reviews of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor upon all the material issues of fact, law, or discretion presented on the record; and (2)

the appropriate rule, order, sanction, relief, or denial thereof.

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action with the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Home Owners Loan Act of 1943, 48 Stat. 128, 12 USC 1464 et seq.

5 (e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of is usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and homefinancing institutions.